TENNESSEE ADR NEWS

A Publication of the Tennessee Supreme Court Alternative Dispute Resolution Commission
January 1999 Vol. 1, No. 2

The Use of Mediation by Corporate America

By Steven E. Groom

A recent survey showed that the vast majority of American corporations have used one or more of the ADR procedures during the last three years. The survey, conducted jointly by Cornell University, the Foundation for the Prevention and Early Resolution of Conflict (PERC) and Price Waterhouse, indicated that 87.6% of U. S. corporations have used mediation, 79% have used arbitration, 41% mediation-arbitration, 35.5% in-house grievance procedures, 23.3% mini-trials, 20.9% fact finding, 10.6% peer review, and 10.5% of the corporations reported having an ombudsperson on staff. Although mediation and arbitration are the two procedures used most frequently, mediation was clearly preferred over arbitration. When asked in the survey, corporations preferred mediation over arbitration 3.5 to 1.

Steven E. Groom is a partner at Farris, Warfield and Kanaday, PLC, in Nashville. He is the former managing attorney of SunTrust Banks, Inc.

SunTrust, which is headquartered in Atlanta, Georgia, has 29 banks and 25 non-bank subsidiaries operating in Georgia, Florida, Tennessee and Alabama. Mr. Groom stated that the SunTrust entities have participated in approximately 300 mediations and arbitrations during the last ten years. The majority of these were mediations in Florida.

(Continued on page 5)

New Federal Law on ADR

By: Magistrate Judge Robert P. Murrian

President Clinton signed Public Law 105-315 on October 30, 1998. Its short title is the "Alternative Dispute Resolution Act of 1998." It will be codified at 28 USC§§651 et seq. Its full text is available on Westlaw and at www.thomas.loc.gov.

Limited space will not allow a detailed discussion of the Act here. The "Findings and Declarations of Policy" reveals that Congress views court-annexed mediation, voluntary arbitration, early neutral evaluation and minitrials very favorably. The Act required each federal district court to authorize by local rule the use of ADR. In courts like ours, the Act requires us to examine the effectiveness of our existing ADR program "and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter."

The Act allows a court to require the parties to use mediation or early neutral evaluation. The court must require litigants in all civil cases to consider using ADR except in those civil cases specifically exempted by the court after consultation with the bar and the U.S. Attorney.

The Act allows (but does not require) the court to refer cases to arbitration with the consent of the parties. This arbitration provision does not apply to alleged violations of Consitiutional rights or where

Judge Murrian sits on the United States District Court, Eastern District of Tennessee, in Knoxville, and is a long time proponent of ADR.

(Continued on page 4)

A Note from the Director

By: Ann Barker

Thanks to all of you approved mediators who returned a completed mediator questionnaire to this office. As of 1/8/99, the ADR Commission had received 233 responses to the survey that was sent to all approved mediators (509 total). We continue to receive responses and therefore have not compiled a final total or issued a final report. However, I thought that you would be interested in an interim report.

The responses received as of January 8 indicate the following:
Mediation is being utilized primarily in civil cases that are not referred through Rule 31. The number of cases mediated were reported in the aggregate so this report utilizes a range of numbers. A low of 878 and a high of 1194 cases (both civil and family) were reported as having been mediated outside Rule 31. Thirty-four respondents indicated that they had handled more than 15 non-rule 31 cases (civil or family). Eighty respondents indicated that they had received no non-Rule 31 cases.

Under Rule 31, nine respondents indicated that they had mediated 15 or more cases. A low of 341 and a high of 685 cases were reported as having been mediated through a Rule 31 referral. About twice as many civil cases were mediated as were family. One hundred thirty (130) respondents indicated that they had received no referrals pursuant to Rule 31.

Two main categories of problems were identified. The first was a lack of referrals and the mechanics of the referral process. Second, a lack of knowledge about mediation by the judges, lawyers and clients. This resulted in cases that were not referred soon enough, clients who were not prepared for the mediation, and lawyers who approached the mediation with an

(Continued on page 3)

Judge Gayden Begins ADR Pilot Program in 20th Judicial District

Litigants whose cases are assigned to Judge Hamilton Gayden's First Circuit Court in Nashville will now be asked to complete a questionnaire that will be used to determine possible alternative resolutions to their disputes.

The questionnaires will be sent out by Judge Gayden, who is initiating a pilot alternative dispute resolution (ADR) program designed to provide more efficient case flow management, improve court productivity and increase the satisfaction level of the judicial process.

The test program began Nov. 1. If successful, it could be extended to all civil matters in Circuit and Chancery Courts in Davidson County, as advocated by the Tennessee Supreme Court.

Gayden said the goals of a successful ADR program are to:

Reduce money, time and other resources consumed by litigants;

Free judicial resources for adjudicative functions;

Increase certainty and predictability of trial calendars by having more cases settle before they are set for trial; and

Reduce the length of time from case filing to case disposition.

Under Gayden's pilot program, litigants whose cases are assigned to his court upon original filings will be asked to respond to a questionnaire containing a checklist of ADR alternatives. Attorneys for both sides will be charged with making the questionnaires available to their clients and ensuring the forms are completed, signed and returned to the court.

The questionnaire is called a "Notice of Availability of Alternative Dispute Resolution Procedures" and will be made

(Continued on page 4)

Victim Offender

Mediation Grows in Tennessee

By Mary Ellen Bowen

Another responsibility of the AOC's Alternative Dispute Resolution Office is to administer state funds for local Victim Offender Reconciliation Programs (VORP). VORP is a mediation model that utilizes volunteer mediators to facilitate an agreement between the victim and offender. Usually the offender is a juvenile who is before the court for the first time and the offense is against property.

Many times when people become victims of crime, they would like to tell the offender how they feel and how their lives have been affected by the offense. The offender also can take this opportunity to be more accountable by taking responsibility for righting the wrong. VORP's mission is to offer an alternative response to criminal behavior and delinquency by giving victims and offenders the opportunity for a face to face meeting where they negotiate a contract for restitution of the crime. From the mission statement of the Nashville VORP "By helping the justice system in [criminal situations] move from adversarial and punitive to cooperative and personal, trained volunteer mediators facilitate the parties to come to terms in a way that offers both an experience of justice and empowerment. VORP realizes that those with the most at stake, the victims and offenders themselves, know best what they need for reconciliation and true accountability to occur."

VORP mediation can work wonders. Two nationally recognized studies of the VORP in Anderson County show a 50% reduction in the recidivism of juveniles who participate in VORP.

VORP's depend on volunteer mediators and provide excellent training and experience for their volunteers. To volunteer or learn more about VORP contact one of the six state-funded VORP's currently operating in Tennessee. These programs have formed a Tennessee VORP Mediation Coalition and will be regular contributors to *ADR News*.

Anderson County Center for Community Justice/VORP of Anderson County
Anne Sides, Director
Phone: (423) 457-7208

The Mediation Center/VORP of Columbia
Jacson Chapman, Director
Phone: (931) 840-5583

Community Mediation Center/VORP of Crossville
David Massengill, Executive Director
Phone: (931) 484-0972

Community Mediation Center/VORP of Knoxville
John Doggette, Director
Phone: (423) 594-1879

VORP of Nashville
Anita Coe, Executive Director
Phone: (615) 256-2206

Mediation Services of Putnam County
Linda Mix, Director
Phone: (931) 528-7145.

Mary Ellen Bowen is Executive Director, Mid South VORP, and formerly the Executive Director of VORP of Nashville. The Mid South VORP is in the process of obtaining funding to serve Lewis, Lawrence, Perry, Wayne and Hickman counties.

(A Note...continued from page 2)
adversarial posture instead of a problem solving attitude. A third problem identified was a lack of CLE options for mediators.

As a result of the survey, the ADR Commission is now planning to sponsor three CLE/CME courses on advanced mediation. In addition, the commission encourages the state and metropolitan bar associations to offer similar courses. The commission will suggest that alternative dispute resolution topics continue to be presented to the Tennessee Judicial Conference, and the commission is considering a public information campaign to educate the public about mediation.

(New Federal Law continued from page 1)
there is more than $150,000 in controversy. The court may presume that less than

$150,000 is involved unless counsel certifies damages exceed that amount.

The Act requires that court to establish qualifications for arbitrators and to certify the arbitrators once they are qualified. Arbitrators are granted quasi-judicial immunity in the Act, and they are given subpoena power.

The award made by the arbitration becomes the judgment of the court and cannot be appealed or otherwise reviewed unless a party makes written demand for trial *de novo* within 30 days of the filing of the arbitration award.

The Act provides for sealing the arbitration award until final judgment is entered in the case. The Act also provides for confidentiality of all ADR proceedings.

The Act required the court to set the compensation payable to arbitrators and other neutrals in accordance with regulations approved by the Judicial Conference. Actual travel expenses of arbitrators and other neutrals may be reimbursed by the court.

There are no penalties for asking for trial *de novo* and then coming out worse than one did in the arbitration. Once trial *de novo* is requested, the case is treated as if it never went to arbitration. The Act provides safeguards to protect the right of the parties to refuse to arbitrate.

What is required by the Act is that litigants in all civil cases not specifically excepted under the Act must consider the use of an ADR technique at an appropriate stage in the litigation. The court must provide at least one ADR process, which can include, inter alia, mediation, early neutral evaluation, minitrial and arbitration.

This court is required by the Act to review its existing program and decide what changes, if any, need to be made. We will be doing that in the coming months. Please address any comments or suggestions you have to any of the judges or magistrate judges.

(Judge Gayden... continued from page 2)
part of the litigants' permanent case file. The wording is comprehensive and merely requires a "yes" or "no" answer to the following list of possible options:

1. If all parties in a case elect to do so, a civil case in this Court can be referred to a judicial settlement conference in order to facilitate settlement in whole or part.

Q. Do you wish to use a judicial settlement conference in this case?

2. If all parties in this case elect to do so, a civil case in this Court can be referred to non-binding, confidential mediation in order to facilitate settlement in whole or part.

Q. Do you wish to use mediation in this case?

3. If all parties in a case elect to do so, a civil case in this Court can be referred to non-binding, confidential case evaluations (also called "early neutral evaluation") in order to facilitate settlement in whole or in part.

Q. Do you wish to use case evaluation in this case?

4. If all parties in a case elect to do so, a civil case in this Court can be referred to binding or non-binding arbitration. Its outcome can be binding or purely advisory, depending on the parties' agreement in advance. Note that the court cannot order the parties to participate in any form of arbitration without their consent.

Q. (a) Do you wish to consider such a procedure and for your lawyer to meet with opposing counsel and the judge to establish an arbitration plan for this case? (b) If you wish to consider such a procedure, do you prefer binding or non-binding arbitration?

The intended purpose of the

(Continued on page 5)

(Judge Gayden...continued from page 4)
questionnaire, Gayden explains, "is that when ADR is checked as an option, that particular file will then be pulled and explored by me as a possible case for fast-

track ADR."

Under existing rules governing judicial proceedings, the courts already have authority to order three types of alternative dispute resolution without the consent of the parties: mediation, judicial settlement conference, and case evaluation. Other types of ADR, such as those offered in the questionnaire, can only be referred with the consent of the parties.

(Use of Mediation continued from page 1)

Why is mediation preferred by U.S. corporations? In mediation, the parties maintain control over the process; they control their own destiny. 100% of all cases settled in mediation were settled upon terms to which the parties agreed. In arbitration, the matter is decided by the arbitrator(s) and the parties have little or no chance to appeal. Also, mediation is preferred because it works. The results speak for themselves. Nationally, between 80 and 90% of all cases submitted to trained mediators settle as a result of the mediation process. Quicker resolution of these matters can result in significant savings in terms of litigation fees and costs, as well as management time. In short, mediation is an efficient use of corporate resources.

Why does mediation work so well? There are a number of reasons. It may be the first time that the parties get an opportunity to hear an unfiltered view of what the other side thinks of the case. It is a chance to be heard, to have one's "day in court", except in a more relaxed setting. As the process develops, and as the parties begin to invest time and effort, the prospect of litigation loses its appeal. The parties often feel they have too much time, effort and emotion invested to walk away without a settlement. Also, as they have heard the other side's position, and the mediator gives perspective through "reality checks", the parties may begin to value the certainty of a settlement over the uncertainty of litigation. Another important factor to the success of mediation is that the process and any resulting settlement are confidential. This confidentiality promotes the candor which is necessary to resolve disputes.

What does it take to make the mediation process work? First of all, the parties must use the mediation process before it will have a chance to work. Unless mediation is court-annexed or mandated by contractual or statutory provisions, the parties must voluntarily agree to use the mediation process. That means that lawyers must be knowledgeable enough to accurately inform their clients of the potential benefits of mediation, and ethical enough to recognize their obligation to do so.

Once the parties have agreed to use the process, several factors contribute to a successful mediation. The lawyers should be prepared and should prepare their clients for the mediation process. All parties should participate in good faith with an open mind toward hearing and understanding the positions presented. All sides must have an appropriate representative at the mediation; one with adequate authority to resolve all issues in dispute, but preferably not one whose actions or involvement gave rise to the underlying dispute. The representatives should not have a personal ax to grind. And of course, you must have a trained, qualified mediator.

What qualifications do you look for in a mediator? In general, the most important factor in choosing a mediator is that he or she be neutral in order to establish and maintain credibility with all parties. Beyond that, different qualifications are important, depending on the nature of the dispute and the parties and attorneys involved. Personality and demeanor are important, as well as mediation experience and skills. In

particular cases, the substantive expertise of the mediator can be important.

How is the legal community responding to mediation? It depends upon the extent to which the lawyers have experienced mediation. Lawyers who have experienced the process are generally very enthusiastic about mediation. Those who have not experienced mediation are more cautious. Like anything else, you are not as comfortable with those things with which you have little or no familiarity. As a trial lawyer, I made the same objections to mediation that I hear lawyers making now. "It simply provides free discovery to the other side; agreeing to mediation may be perceived as a lack of confidence in my case or a lack of commitment to aggressively represent my client"; or a comment often heard, "If the clients want to settle this matter, the lawyers can settle it by ourselves. Why pay someone else?"

As far as giving away free discovery, the parties can provide as much or as little information as they choose to in the mediation process. Obviously, the more information you provide and the more persuasive your presentation, the more likely the mediation will result in a settlement satisfactory to you and your client. As far as showing weakness or a lack of commitment, those perceptions can be overcome by the excellent negotiating skills possessed by most good trial lawyers. The process and forum may be different, but it is still a good opportunity to showcase those skills.

What about this comment that good lawyers should be able to settle these cases by themselves without the need to pay someone else?
That comment underestimates the value of a qualified neutral serving as the mediator. Once the mediator establishes that neutrality and credibility with all parties, that mediator can communicate the same information as the lawyers could, but the reception will be different. Harvard Law School Professor Robert Mnookian refers to this as "reactive devaluation"; the human tendency to reject or devalue proposals just because they were suggested by your opponent. The same proposal made by the mediator once neutrality and credibility are established can be received much more objectively. The mediator is also in a better position to effect "reality checks" or "reality testing" on the respective parties. The mediator tests the parties' expectations or opinions by asking probing questions as a devil's advocate. In short, good mediators help settle some cases that litigants and their lawyers could never settle alone.

Is every lawsuit capable of being successfully mediated? There are simply some cases that the parties feel need to go to trial: cases where public vindication is important; cases where it is important to establish precedent; cases that would turn dramatically one way or the other based upon a ruling on an issue of law; cases where the defendant feels that it is important to demonstrate that it will not tolerate frivolous lawsuits or cases in which the plaintiff feels that they must get the case to a jury to maximize their recovery. It is important to note that even when these factors are present, the uncertainties associated with them often make a mediated settlement more attractive.

Current Events . . .

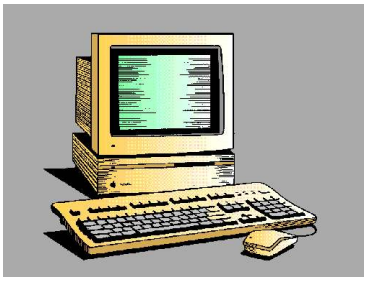
552 Mediators Approved

The Commission has now approved 552 mediators as meeting the standards required by Rule 31. Of these, 309 were approved as civil mediators, 125 as family mediators and 118 as both civil and family mediators. Of the total number of mediators, 366 are attorneys and 186 are other professionals. The next list of approved mediators will be issued at the end of January. It will be mailed to all state court judges and clerks. The list is available electronically on TBA-link at **www.tba.org**.

★ ★ ★ ★ ★

E-Mail List for Tennessee Mediators and Neutrals

There's an e-mail listserve or discussion list for any person involved in mediation or who is a third party neutral in Tennessee. This includes "Tennessee Supreme Court Mediators." The list is sponsored by the Mediation Association of Tennessee, MAT. Membership is not required to participate on the list. Visit the MAT web site at" **www.cide/com.mat** and go to the "links to other mediation related sites" area. The info about the list is at the top of the list. If you have any questions, contact Dale B. Robinson of MAT at: **dbr:chrysalis@att.net** or call him at (423) 525-1099.



W. Emmett Marston is new ADR Commission Chair

On January 13, 1999 Memphis attorney W. Emmett Marston was appointed chair of the ADR Commission. Mr. Marston has been a member of the commission since its inception and is familiar with the issues, concerns and goals of the group. Mr. Marston succeeds Shelby R. Grubbs of Chattanooga who had been chair of the commission since January 1996. Under Mr. Grubbs' leadership the commission implemented most of Supreme Court Rule 31 and set in place a system for the training and approval of mediators. The commission is working with the court to promote the use of mediation in most civil matters and to implement the other forms of ADR specified by the rule.

Chief Justice E. Riley Anderson presented a plaque to Mr. Grubbs, along with outgoing commission members Spruell Driver, Jr. of Nashville and Claudia S. Jack of Columbia, in honor of their work on the commission.

Send your questions and comments to:
Ann Barker, Director or
Christy Smith, Staff Assistant
Tennessee ADR Commission
511 Union Street, Suite 600
Nashville, TN 37243-0607
Phone: 615-741-2687
Fax: 615-741-6285
e-mail: ib271r2@smtpaoc.tsc.state.tn.us

MEDIATION CLE/CME COURSES AVAILABLE
These trainings will meet the continuing education requirements of Rule 31

Chattanooga

Advanced Mediation Training (6 Hours)
February 19, 1999
Sponsored by the Chattanooga Bar Association
Phone: (423) 756-3222

Advanced ADR Training (6 Hours)
November 5, 1999
Sponsored by the Chattanooga Bar Association and the Federal Bar Association
Phone: (423) 756-3222

This list can be found on the Tennessee Supreme Court web page at **www.tsc.state.tn.us** and also on the Tennessee Bar Association web site at **www.tba.org**.

Alternative Dispute Resolution Commission
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37243-0607